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The Jew Who Met Himmler – and Other Stories

STANLEY A. GOLDMAN*

PROLOGUE

“History... is a nightmare from which I am trying to awake.”¹ Prophetically uttered in James Joyce’s 1914 novel *Ulysses*, this bleak synopsis of lost time is a response to an early twentieth century anti-Semitic rant, representative of a hatred which was all too soon to grow until the night terrors of the past were but shadows of the horrors to come.

I. *“If there is no judge and no judgment, then everything is arbitrary and Hitler, may his name perish, was right: force is the only law. Then it’s normal to play with the skulls of small children and to*

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1. JAMES JOYCE, *ULYSSES* 34 (First Vintage Int’l 1990) (1934).

—Mark my words, Mr [sic] Dedalus, he said. England is in the hands of the jews [sic]. In all the highest places: her finance, her press. And they are the signs of a nation’s decay. Wherever they gather they eat up the nation’s vital strength. I have seen it coming these years. As sure as we are standing here the jew [sic] merchants are already at their work of destruction....

....

... Is this old wisdom? He waits to hear from me.

— *History, Stephen said, is a nightmare from which I am trying to awake.*

Id. at 33-34 (emphasis added).

To the Nazis, “[t]he Jews were identified with the fragmentation of urban civilization.... They stood behind the ‘rootless cosmopolitanism’ of international capital and the threat of world revolution.... They were... the ‘world enemy’ against which National Socialism defined its own grandiose racial utopia of a Thousand-year Reich.”

ROBERT S. WISTRICH, *HITLER AND THE HOLOCAUST*, at xii (2001).

*order a father to dig a grave for his family.*²

Like any good lawyer, Raphael Lemkin was searching for just the right word — a word that he hoped would make a difference.

Though a Jew, Lemkin had risen high as a prosecutor in late 1920s Poland until his “race” (as well perhaps as his outspoken advocacy of human rights) cost him his official position.³ When the war came, he would become a lonely survivor of his family, almost all of whom were to perish in the conflagration to follow.⁴ In the chaos of the 1939 German invasion, he managed to escape Poland through Latvia to Sweden, to Russia, to Japan, and, in 1941, to the United States (where he was to become, for a few years, a law professor).⁵

Though Lemkin had physically escaped the Holocaust, he could not emotionally abandon those left behind. In 1943, he was one of the many writing vainly to alert the world to the ongoing destruction of European Jewry.⁶

A decade earlier, he had written an essay for the League of Nations entitled *The Crime of Barbarity*, inspired in large part by the 1915 to 1923 Turkish massacre of the Armenians.⁷ He now sought to connect what he likely believed to be the greatest crimes

2. ISAAC BASHEVIS SINGER, *SHADOWS ON THE HUDSON* 50 (1998).

3. JOHN COOPER, *RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION* 17, 24-25 (2008); see DAN ESHET, *TOTALLY UNOFFICIAL: RAPHAEL LEMKIN AND THE GENOCIDE CONVENTION* 9-12 (Adam Strom et al. eds., 2007). In 1929, Lemkin was made a deputy public prosecutor in the District Court of Warsaw and was subsequently appointed as a representative to, or member of, various committees dealing with the Polish criminal justice system. COOPER, *supra*, at 17. “Despite the increasing severity of the economic boycott against Jews in Poland, Lemkin’s private legal practice thrived [beginning in 1934], after he was forced to resign his official appointment.” *Id.* at 24.

4. Kurt Mundorff, *Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT’L L.J. 61, 73 (2009). Only Lemkin’s brother, his brother’s wife, and their two children survived; at least forty-nine others were killed. *Id.*

5. COOPER, *supra* note 3, at 32, 34-35, 38.

6. See *id.* at 56-60.

7. See ESHET, *supra* note 3, at 3-4. Lemkin had prophetically asked: “Why was killing a million people a less serious crime than killing a single individual?” *Id.* at 4. [I]n 1933 . . . Lemkin drafted a paper that drew attention both to Hitler’s ascent and to the Ottoman slaughter of the Armenians The attempt to wipe out national, ethnic, or religious groups like the Armenians would become an international crime that could be punished anywhere The threat of punishment, Lemkin argued, would yield a change in practice.

SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 19-20 (2002).

of the twentieth century. It would have been so helpful to have had a single word capable of describing such all-but-unfathomable tragedies. Unfortunately, there was no individual term in all the tongues he searched that could adequately express the monstrous intent that connected these events; so he simply created one.⁸

He combined the Greek word “genos” for family or tribe and the Latin word “cide” for killing.⁹ The term he constructed was “genocide”;¹⁰ a resource for prosecutors at Nuremberg,¹¹ the concept is now a cornerstone of international justice.¹²

Raphael Lemkin had found the right word.

8. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

9. *Id.*

10. *Id.*

11.

Although Lemkin never claimed to have influenced the form of the indictment prepared by the prosecutors at Nuremberg, apart from the insertion of the charge of genocide, there are interesting parallels between the ideas expressed in [his book] *Axis Rule in Occupied Europe* and the proposals of Colonel Murray C. Bernays [for the indictments]. So much so that Robert Conot [Justice at Nuremberg] argued that there was a direct connection. . . . Bernays was persuaded by Lemkin’s formulation that members of the SS and the Gestapo had participated in a criminal conspiracy and wrote a memorandum on 15 September 1944 entitled the ‘Trial of European War Criminals’ incorporating these ideas.

This memorandum . . . ‘shaped the subsequent prosecutions at Nuremberg’ and ‘may, indeed, be one of the most significant documents in international law.’

COOPER, *supra* note 3, at 62 (footnotes omitted).

In his closing argument before the Nuremberg Tribunal, British Attorney General Hartley Shawcross “devoted much of his speech to ‘genocide’, the new crime of the Nuremberg indictment, which in the conception of Professor Raphael Lemkin, an eminent lawyer . . . contains all the means, including aggressive war, aimed at the extermination of nations and racial groups.” *Id.* at 70-71. Yet despite all his efforts and the influence of his writings, no member of the Nazi hierarchy was convicted of genocide. “[T]he central core of the Lemkin-Bernays thesis that the Nazi era represented a conspiracy perpetrated by criminal organizations was eliminated and the atrocities committed by the Nazis in Germany before the war were ignored.” *Id.* at 74.

[However,] [i]n the 12 trials of the United States Military Tribunal of SS commanders, military officers, German doctors and legal figures which followed the [inaugural] proceedings at Nuremberg, the concept of genocide won gradual acceptance. So too, the Polish Supreme National Tribunal convicted the commandant of Auschwitz of genocide, [though genocide was not yet an international crime at the time] while another accused was charged with ‘genocidal attacks on Polish culture and learning’.

Id. at 75.

12. POWER, *supra* note 7, at 479.

II. "AND CARTHAGE MUST BE DESTROYED"¹³

Genocide is as old as recorded history itself.¹⁴ Throughout the centuries, those of superior might have often attempted to rid themselves of the "other." These "others" may have been a different tribe (people of a different creed living in their midst) or the entire population of a conquered city-state. Perhaps the most famous example of the latter being Rome's imposition of "Carthaginian peace"; a darkly ironic historical phrase that is perhaps best explicated by the conspicuous 2100 year absence of those of identifiable Carthaginian ancestry.¹⁵

Yet, there is no question that the twentieth century was the century of genocide.¹⁶ Some events, such as the decimation of the Assyrians,¹⁷ are rarely any longer mentioned. Other atrocities, though more pronounced in the public consciousness, are still subjected to the attacks of those intent on instilling doubt.¹⁸

There are fringe elements of Holocaust deniers, the ranks of which are likely to swell when the last survivor must finally rest.¹⁹ There are nations that refuse to acknowledge the murder of as many as 1.5 million Armenians, or the motive behind their deaths.²⁰ Even more tragically, governments have spent years

13. BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 49 (2007). Regardless of the subject of his speech, this is the way ancient Roman Senator Cato the Censor would inevitably end his senatorial orations. *Id.*

14. *See id.*

15. *See id.* at 49-58.

16. *See id.* at 393-571 (listing examples of genocide in the twentieth century).

17. COOPER, *supra* note 3, at 135-36.

18. *See, e.g.,* Jeffrey Fleishman & Ramin Mostaghim, *Iranian Vilifies the West*, L.A. TIMES, Sept. 21, 2009, at A14 (noting generally that Iranian President Mahmoud Ahmadinejad chose the Jewish high holiday of Rosh Hashanah, September 18, 2009, to again deny the World War II German Holocaust inflicted upon the Jews).

19. *See, e.g., id.*

20. *See* Sebnem Arsu & Sabrina Tavernise, *Turkey Criticizes House Committee Vote on Armenian Killings*, N.Y. TIMES, March 6, 2010, at A6, available at <http://www.nytimes.com/2010/03/06/world/europe/06turkey.html>. With each Congressional attempt to label the Turkish mass killing of Armenians as genocide, Turkey reacted clearly, forcefully and with political potency. On March 5, 2010 Turkey's Foreign Minister Ahmet Davutoglu stated that a Congressional committee vote to condemn the Turkish mass murder of Armenians as a genocide would act as an obstacle to any possible rapprochement between Armenia and Turkey. *Id.* ("Each interference by a third party will make this normalization impossible.").

On October 10, 2007, President Bush called for the rejection of a Congressional resolution officially recognizing the Armenian Genocide for fear of alienating Turkish allies. Elizabeth Williamson, *Support Wanes for American Genocide Bill*, WASH. POST,

avoiding the use of the term “genocide” so as to relieve themselves of the often politically unpopular, but legally mandated obligation to militarily intervene.²¹

Nor would it be anything more than conceit to believe that such inhuman practices are but cruel relics of bygone eras and will not trouble the new millennium. Bosnia, Rwanda, and Darfur, to name but a few, teach us the opposite.

It may be a small yet meaningful consolation that today, unlike in the ancient world or even much of the twentieth century, the possibility of some legal recourse against the perpetrators of such horrors exists. Currently, there are both ongoing criminal and civil litigations which seek to obtain the smallest of redresses for the murdered victims and survivors of these attempts at man-made extinction.²² Might we also dare to hope that the existence of such legal actions imposing civil liability as well as criminal responsibility could in some way dissuade potential or even ongoing perpetrators?

Raphael Lemkin did not doubt such sanctions would deter; in his mind, it was just a matter of time.²³ As soon as World War II had ended, he left his professorial position. “Desperately short of funds, Lemkin needed to stay with . . . friends . . .”,²⁴ but it was necessary in order to begin his one-man crusade to have genocide

Oct. 17, 2007, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/16/AR2007101602243.html>. In October 2007, the House Foreign Affairs Committee passed H.R. 106. *Id.* After President Bush warned that approval of H.R. 106 would endanger U.S.-Turkey relations, House support dissipated and the hope of officially recognizing the Armenian Genocide was put on hold once again. *Id.*

21. The Clinton administration spent years avoiding the term “genocide” so as to relieve itself of such obligations in the Balkans or Rwanda. *See* POWER, *supra* note 7, at 508. “Because America’s ‘vital national interests’ were not considered imperiled by mere genocide, senior U.S. officials did not give genocide the moral attention it warranted.” *Id.* at 504. It was not merely a series of unfortunate oversights which led the United States to resist acknowledging that genocide was occurring, rather “[t]hey were concrete choices made by this country’s most influential decisionmakers [sic] after unspoken and explicit weighing of costs and benefits.” *Id.* at 508. Even after belated Western intervention, “American diplomats had no great enthusiasm for the prosecution of Balkan war criminals. Some of these men . . . [had] powerful domestic followings. . . . [Thus they were] deemed essential to America’s plans for a stable region.” GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 7 (2000). It was also feared that their arrests could spark violence. *Id.*

22. *See, e.g.,* International Criminal Court, ICC – All Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/>.

23. POWER, *supra* note 7, at 479.

24. *See* COOPER, *supra* note 3, at 94.

made an international crime.²⁵ If he could achieve his goal, he envisioned the creation of a system for bringing those accused of the crime he had named before international tribunals or the municipal courts of any signatory nation when a suspect turned up in their midst.²⁶ Such proceedings would incapacitate as well as punish the guilty perpetrators. Both public outrage, when such crimes were openly documented, as well as the fear of consequences brought about by such trial and punishment, he believed, would deter future genocides.²⁷

In the fall of 1946, Raphael Lemkin began to haunt the corridors of the United Nations building.²⁸ With frayed collar and cuffs, perennially penniless and probably hungry,²⁹ he would forage for delegates whose support he needed, as well as for news reporters he hoped would help publicize the righteousness of his cause.³⁰ Once having cornered a journalist quarry, his sales pitch would normally start with an emphatic offer – “I have a Genocide story for you.”³¹

I, too, have a genocide story to tell; a little known and “minor” incident from the waning days of World War II. I offer it, as Lemkin might have, in the hope that it will illustrate how the enforcement of his dream could make a difference.

III. *HE WHO SAVES A LIFE, SAVES A WORLD*³²

There was no one more responsible for the Holocaust than Heinrich Himmler.³³ On April 20, 1945, the forty-five-year-old

25. *Id.*

26. *Id.*

27. *See id.* at 480.

28. *See* COOPER, *supra* note 3, at 94.

29. *See id.*; POWER, *supra* note 7, at 52 (“[J]ournalists frequently spotted him in the UN cafeteria cornering delegates, but they never saw him eat.”).

30. COOPER, *supra* note 3, at 80 (“[M]ost of Lemkin’s efforts were concentrated on the daily lobbying of the United Nations Correspondents of the American press . . .”).

31. *Id.* at 78, 81.

32. Apologies to the Talmud, which I am paraphrasing here. The accurate full quote reads as follows: “He who saves a life, it is as if he has saved a whole world; and he who destroys a life, it is as if he had destroyed a whole world.” THE BABYLONIAN TALMUD, *Sanhedrin* 4:4.

33. MARTIN ALLEN, *HIMMLER’S SECRET WAR: THE COVERT PEACE NEGOTIATIONS OF HEINRICH HIMMLER*, at xi (Carroll & Graff Publishers 2006) (2005) (“[T]he man responsible more than any other for the Holocaust in the deaths of multiple millions.”). *See generally* NORBERT MASUR, *REPORT TO THE WORLD JEWISH CONGRESS REGARDING HIS VISIT WITH HEINRICH HIMMLER*, Apr. 20, 1945 (1945), *available at* <http://www.brookdalecc.edu/pages/992.asp> (outlining Himmler’s role in the Holocaust and

Himmler (both Germany's Interior Minister and head of its SS) bid farewell to his Führer, whose birthday he had been celebrating with the Nazi leader in the Reich Chancellery.³⁴ With his visit over, the German Minister proceeded on his way to a principal role in what was perhaps the strangest and most enigmatic encounter of the War; a meeting which could prove personally dangerous to Himmler if word of it were ever to reach Adolph Hitler.³⁵ Waiting for him at the house of a friend was Norbert Masur, a representative of the Swedish section of the World Jewish Congress, who had flown from the safety of neutral Sweden into the heart of war-torn Germany in the hope of saving the lives of some of the tens of thousands of Jews still surviving under the "fatherland's" control.³⁶ The meeting had been arranged by two men whose wartime experiences could not have been more divergent.³⁷

The first organizer was Gilel Storch (Hilela Storche), a self-made wealthy Latvian Jewish businessman who had managed to escape to Sweden soon after the Red Army's 1940 takeover of his homeland.³⁸ Within months he also obtained the safe transport of his wife and two-year-old daughter before the conquest of his former nation by the Third Reich, and the imposition of its horrible objective.³⁹

Like Raphael Lemkin, Storch dedicated himself to saving the Jews of Europe from the Nazi Holocaust. Although some of his efforts proved futile, Storch was able to save lives. It has been reported that a timely phone call made on Storch's behalf to Heinrich Himmler in March of 1945 may have been the single act which averted the implementation of a German plan to blow up the Bergen-Belsen extermination camp and kill its remaining prisoners.⁴⁰

The call is believed to have been placed by the other man in our story whose efforts brought about the meeting with Himmler –

negotiation talks with Norbert Masur).

34. MASUR, *supra* note 33, para. 15; see ALLEN *supra* note 33, at 261. This was the last time Himmler would see his leader. *Id.*

35. ALLEN, *supra* note 33, at 260.

36. MASUR, *supra* note 33, paras. 4-7.

37. *Id.* paras. 2-4.

38. ALLEN, *supra* note 33, at 243.

39. See LENA EINHORN, MENSCHENHANDEL UNTERM HAKENKREUZ (Von Wolfgang Butt trans., Klett-Cotta 2002) (1999).

40. *Id.* at 485.

Felix Kersten.⁴¹ Kersten was an Estonian-born German from a well-to-do family who, after having migrated to Berlin, had become a prominent physical therapist.⁴²

Heinrich Himmler may have been the second most powerful man in Germany, but he was terrified of the first. His fear of Adolf Hitler was so great that after each meeting with his nation's leader, the ruthless head of the dreaded Gestapo⁴³ was seized with agonizing stomach pains.⁴⁴ The Estonian therapist proved to be the only one whose methods were able to alleviate Himmler's afflictions.⁴⁵ This patient-physician bond grew so strong that Kersten, permitted by the SS leader to relocate to Sweden on condition that he make himself available to return to treat his patient whenever summoned, seems to have been used by Himmler to seek out Allied contacts.⁴⁶ Germany's Interior Minister appears to have planned to save himself with offers of compromise and a willingness to negotiate with the Western Allies.⁴⁷ At a Stockholm tea party one Sunday afternoon in late February 1945, Storch and Kersten met for the first time.⁴⁸

By April 1945, Kersten had arranged a face-to-face encounter between Himmler and Storch to take place in Germany.⁴⁹ Unable to make the journey,⁵⁰ however, Storch sent the willing Norbert

41. *Id.* at 376-77. For a further discussion of Storch's involvement in attempts to rescue Jews, see YEHUDA BAUER, *JEWS FOR SALE?* 245 (1994).

42. EINHORN, *supra* note 39, at 42-49. Kersten's procedures could perhaps be better described as those of a massage therapist.

43. "Himmler was not to be denied his prize of complete control of the police and Gestapo, which he astutely realized could be the key to real power in the Reich. . . . [T]he Gestapo passed into Himmler's control in early April 1934." ALLEN, *supra* note 33, at 28. He had become Reichsführer and head of the SS on January 6, 1929. *Id.* at 19.

44. In 1940, Himmler's search for relief had finally led him to Kersten, whom he summoned to his Gestapo headquarters for what was to be the first of many treatment sessions. *Id.* at 38-42.

45. See MASUR *supra* note 33, paras. 1-2.

46. See *id.* paras. 2-3. Kersten was permitted to relocate in 1944. The move gave the SS leader a trusted connection in a neutral nation. See EINHORN, *supra* note 39. "What is clear is that Kersten was a moderating influence in Himmler's court . . . and that Kersten smoothed the way . . . for talks with the SS chief." BAUER, *supra* note 41, at 248.

47. On April 29, 1945 Himmler was, in fact, dismissed from his government positions when Hitler learned of his Interior Minister's attempts at negotiating a German capitulation. ANNA PORTER, *KASZTNER'S TRAIN: THE TRUE STORY OF AN UNKNOWN HERO OF THE HOLOCAUST* 294 (2007).

48. EINHORN, *supra* note 39, at 346-47.

49. *Id.* at 425.

50. The reason Storch backed out may never be known, but it has been alleged that his emotionally distraught wife threatened suicide if he left on the dangerous journey. *Id.* at 427.

Masur, in his place.⁵¹ At 2:00 PM, April 19, 1945, a small plane carrying only two passengers, Masur and Kersten, left Sweden with ravaged Berlin as its destination.⁵² Masur was traveling to, what was for him, the worst place on earth,⁵³ a nation where being a Jew was a capital offense,⁵⁴ and he was going there to meet the head executioner.⁵⁵

Once on the ground at Tempelhof airfield in Berlin, the two were driven seventy kilometers north to Kersten's German estate.⁵⁶ Arriving just before midnight, they waited twenty-six hours for the Nazi leader's arrival for what proved to be two and a half hours of negotiations⁵⁷—after which the Jewish “guest” would be allowed to safely return back to Sweden by automobile.⁵⁸ It was the product of these talks which made Norbert Masur a somewhat historic, rather than a merely quixotic, figure to those few who realized what he had dared.⁵⁹

Knowing that German defeat was imminent and perhaps fearing the consequences of his crimes, Himmler promised Masur a gesture of good faith that he may have hoped would put him in better stead if he were ever to fall into Allied hands.⁶⁰ Yet, even though he undoubtedly understood that the war was lost, it still remains an enigma why one of Nazi Germany's most powerful rulers would be interested in cultivating the good will of a Jewish organization.⁶¹

The answer to this riddle may emerge from the convergence of three points. First, Western leaders were not interested in negotiating anything less than total German surrender, something Herr Himmler could not deliver.⁶² Yet the United States, over the

51. *See id.* at 428. Storch would never forgive himself for not having gone and Himmler may never have known of the last minute switch, perhaps believing all along that he was negotiating with Storch himself. *See also* MASUR, *supra* note 33, para. 4.

52. MASUR, *supra* note 33, paras. 6-7.

53. *Id.* para. 6.

54. WISTRICH, *supra* note 1, at xi (“To be born a Jew, in the eyes of Adolf Hitler and the Nazi regime, meant that one was a priori not a human being and therefore unworthy of life.”).

55. MASUR, *supra* note 33, para. 4.

56. *Id.* paras. 9, 14.

57. *Id.* paras. 20-54.

58. *Id.* para. 49.

59. *See id.* para. 1.

60. *See id.* para. 47; EINHORN *supra* note 39.

61. *See* MASUR, *supra* note 33, para. 47.

62. ALLEN, *supra* note 33, at 284.

objection of Winston Churchill,⁶³ had given its blessing to efforts aimed at obtaining the release of captive Jews, so long as nothing tangible would be provided to the Germans in exchange.⁶⁴ Thus, this simply may have been the best Himmler could do.

Second, since the Jews had been the group most targeted by the Nazis and particularly the SS, perhaps the SS leader hoped any Jewish testimonial on his behalf might eventually help save his life.⁶⁵ That late war cooperation in efforts to rescue Jews might eventually work to the benefit of even high ranking members of the SS, had been recommended on November 5, 1944 to Heinrich Himmler's representative in Hungary, Lieutenant-Colonel Kurt Becher by Roswell McClelland, an official of the War Refugee Board (an agency of the United States government established by Franklin Roosevelt a few months earlier).⁶⁶ The two were meeting clandestinely in a conference room at Zurich's Savoy Hotel. McClelland told Becher, who was apparently there acting on behalf of his SS leader, that with Germany's defeat in sight, cooperation in the saving of Jewish lives "would count in his favor in the war criminals' trials at the end of hostilities."⁶⁷ Whether the Nazi Colonel ever related this advice to his superior, or whether the Reichsführer may have divined it for himself, may never be known.⁶⁸ What is known is that Becher soon chose to follow

63. There is, in fact, considerable question as to how much the English leaders cared about the lives of Jews under Nazi control. On July 11, 1944, Churchill sent a note to British Foreign Secretary Anthony Eden stating his position that there "be no negotiations of any kind" with Germany on the question of releasing Jewish captives. DINA PORAT, *THE BLUE AND YELLOW STARS OF DAVID: THE ZIONIST LEADERSHIP IN PALESTINE AND THE HOLOCAUST 1939-1945*, at 206 (1990); PORTER, *supra* note 47, at 212.

The reasons given by the Allies for their refusal to bomb Auschwitz are greatly suspect. . . . [They] claimed that the distance was too great; yet in August [1944], during the Warsaw rebellion, Allied planes flew all the way from Italy to Warsaw and back. . . . As for the claim that it was impossible to achieve accurate hits, industrial plants very close to Birkenau were hit with great accuracy. . . . Certainly the danger to the lives of the pilots on missions around Birkenau would not have been any greater if Birkenau had been added to their targets. . . .

Although Churchill and Eden [finally] agreed to the bombing [of Auschwitz] . . . they did not exert any real pressure on their subordinates to carry it out. There is no way to avoid the conclusion that the Allies did not bomb Auschwitz because they were simply indifferent to the fate of the Jews.

PORAT, *supra*, at 219.

64. See PORAT, *supra* note 63, at 141, 205.

65. MASUR, *supra* note 33, para. 47.

66. See BAUER, *supra* note 41, at 157, 226.

67. PORTER, *supra* note 47, at 262.

68. A widely told scenario of an effort by Himmler to save all the Jews of Hungary

McClelland's suggestion by cooperating in the ransoming of Hungarian Jews, and succeeded in saving himself from conviction at Nuremberg.⁶⁹

may not in fact be true. Interview with the Israeli prosecutor of Adolph Eichmann, Gabriel Bach, in Jerusalem, Isr. (July 20, 2009). Hannah Arendt, in her book about the trial of Adolph Eichmann, claimed that Eichmann had countermanded an order by Himmler to stop the rail transport of Hungary's remaining Jews to Auschwitz with his own decision to force march 50,000 Hungarian Jewish captives to that extermination camp. *Id.* This oft repeated story may be incorrect. The order in question appears to have actually come from Hitler himself, and was to free 8,700 Jews from the Budapest in exchange for Hungarian leader Dome Sztojay's promise to remain in the War on Germany's side. *Id.* Himmler seems not to have been involved. *Id.*

69. See PORTER, *supra* note 47, at 262. While Jewish testimonials on behalf of suspected war criminals were rare, the sworn affidavit by Rezso Kasztner is the most famous, or perhaps infamous, example. Kasztner, himself a Hungarian Jew and a representative of various organizations, including the World Jewish Congress, had negotiated the exchange of a number of Jews for payments to willing Nazi officials near the war's end. Kasztner, amongst whose many wartime works was the providing of "funds to feed and clothe Oskar Schindler's Jews," *id.* at 4, told prosecutors at Nuremberg that "[t]here can be no doubt that Becher belongs to the very few [sic] leaders having the courage to oppose the program of annihilation of the Jews and [in his] trying to rescue human lives." *Id.* at 310. In the waning days of the war, Kasztner, who had managed to stay alive and broker the freeing of Jews while remaining in Axis-allied Hungary, helped organize and had been present at the November meeting between Becher, whom Himmler had made responsible "for the economic exploitation of the Jews" in Hungary, BAUER, *supra* note 41, at 164, and McClelland in neutral Switzerland. PORTER, *supra* note 47, at 261. On April 11-12 in 1945, "accompanied by Kasztner, Becher induced the German commanders to hand over the [concentration] camp to the advancing British without a fight . . . [thereby] probably saving the lives of the internees." BAUER, *supra* note 41, at 249.

In gratitude, Kasztner's testimonial clearly saved the Minister of the Interior's underling from conviction. In fact,

[d]uring Becher's interrogation by Allied officers in Nuremberg on July 7, 1947, Kasztner suddenly appeared . . . Kasztner more or less forced [Becher] to 'remember' that he had intervened with Himmler in favor of the Jews and that, as a result, the Germans in Budapest had rescued the rest of the Jews there.

Id. at 240.

Walter Rapp, assistant to the chief United States Prosecutor at Nuremberg stated "that Becher, [who was taken into custody by the Americans on May 24, 1945] until the arrival of Kasztner . . . was merely one of many suspects and it seems probable that if put on trial, he would be convicted. He has Kasztner to thank for his freedom." PORTER, *supra* note 47, at 310. This leniency was granted even though, in summer and fall of 1941, Becher had certainly been involved in the rounding up and mass executions of Jews in Russia's Pripet Marshes; his cavalry brigade having been specifically ordered to do so by Himmler himself. *Id.* at 131.

There were numerous later attempts to bring to justice the man who had always made certain to sign his correspondence to the head of the SS: "[T]he Reichsführer's most obedient Becher." *Id.* at 130. Yet, in spite of the fact that the former Himmler henchman's belated humanitarian efforts had been accompanied with the extorting of substantial (and largely unrecovered) sums from Jewish organizations, as well as the desire to save himself in the post-war world, he was never tried for his crimes. BAUER, *supra* note 41, at 250. He

Third, by 1945 Himmler may have still been a true believer or simply a pragmatist.⁷⁰ But whether fanatic or opportunist, he had spent over two decades as the living embodiment of the propaganda central to Nazism.⁷¹ The world was run by a secret Jewish Order.⁷² Although in reality Gilel Storch and Norbert Masur were insignificant players on the world stage,⁷³ to Himmler they might have well have been representatives of power behind the thrones.⁷⁴

All of his desperate efforts, of course, proved futile. Barely a month after his meeting with Masur, a fleeing Heinrich Himmler was captured by British soldiers.⁷⁵ While in an internment camp, he chose to end his life with a bite to the cyanide capsule embedded in his tooth,⁷⁶ his body buried in an unmarked grave near

died in his own bed, exactly 50 years after the end of World War II, wealthy and unconvicted. PORTER, *supra* note 47, at 322. Kasztner, on the other hand, was assassinated in Israel in 1957 by fellow Jews who believed their victim had cooperated with the Nazis. *See id.* at 354-55, 57.

70. *See* ALLEN, *supra* note 33, at 160 (“[H]e was secretly wooing the allies and making a bid to curry favor with the Jews; trying to insure his own political future whilst ordering German troops to fight to the death to postpone the inevitable defeat.”); BAUER, *supra* note 41, at 1 (“[T]he motives of Heinrich Himmler . . . and his closest advisors, have not been adequately examined.”). Ultimately, Himmler’s true motives may never come to light as he apparently did not and “would not have committed any of his thoughts to paper.” *Id.* at 168.

71. Himmler had, beginning in approximately 1919, become a believer in the right-wing theory that Germany’s defeat in WWI was the fault of the Jews, the Socialists and the Bolsheviks, *see* ALLEN, *supra* note 33, at 10, finally joining the Nazi Party in August 1923. *Id.* at 12. By 1924, he had become a “tireless worker on behalf of . . . the Party, his role that of a key parliamentary worker keeping contact with the outlying communities, and converting any he could to the radical new cause that was National Socialism.” *Id.* at 17. “[T]he adult Heinrich Himmler separate from the party and its ideology never existed. Himmler was Nazism.” *Id.*

72. *See id.* at 193-95.

73. *See* BAUER, *supra* note 41, at 1 (“Prior to 1939 the Jews had no political clout and no influence to speak of in the West—contrary to popular belief. After 1939 they lacked, in addition, military forces, or a government-in-exile, central command, or united community anywhere, whether in Europe or in the free world, and had no influence in Allied councils.”).

74. “[T]he Nazis saw the Jews as their main enemies, the enemies who stood behind and controlled all their other enemies . . .” *Id.* at 257. “The Jews, in Himmler’s ideology . . . ruled the Western Allies and . . . controlled Bolshevik Russia.” *Id.* at 168.

[W]ith the weakening of Germany’s position, the desire to make an approach through the Jews to powers controlled by the Jews must have been very strong for a Nazi trying to rescue Nazism. After all, the Jews, in Himmler’s mind, ruled the world of the enemy, and it was only logical to try that approach
Id. at 253.

75. *Id.* at 250-51.

76. There is still something of a controversy surrounding the exact circumstances of

Lüneburg Heath.⁷⁷

On April 21st, however, he may have still had hope.⁷⁸ Thus, in exchange for the delivery of his good auspices to the West,⁷⁹ Himmler ordered that one thousand Polish Jewish women, who might otherwise have been killed within days, be released from the Ravensbrück extermination camp and provided safe passage to Sweden.⁸⁰

Himmler's death. Various British memos and telegrams allegedly authored in May 1945 indicate that it was not suicide but rather execution that ended Himmler's life, have been declared inauthentic by various authorities. The documents included an alleged departmental memorandum credited to John Wheeler-Bennett of the British Foreign Office stating: "We cannot allow Himmler to take the stand in any prospective prosecution, or indeed allow him to be interrogated by the Americans. Steps will therefore have to be taken to eliminate him as soon as he falls into our hands." See ALLEN, *supra* note 33, at 289.

Also found in the National Archives was a telegram dated May 24, 1945, (allegedly sent just a few hours after Himmler's reported suicide) stating: "We successfully intercepted HH last night at Luneberg [sic] before he could be interrogated. As instructed, action was taken to silence him permanently." *Id.* at 290.

Additionally there was a letter from Brandon Bracken, Minister for Political Warfare Executive, written just a few days after Himmler's death in which he allegedly said:

I am sure that if it were to become public knowledge that we had a hand in this man's demise, it would have devastating repercussions for this country standing. I am also sure that this incident would complicate our relations with our American brethren; under no circumstances must they discover that we eradicated "Little H"

Id. at 291.

Martin Allen has written:

[W]hen I first examined the documents in the autumn of 2003, there was nothing about them to indicate that they were anything but genuine letters and memoranda. There seemed to be no purpose in "seeding" the British National Archive with inauthentic documents. Given the evidence, I have to say that I accept that certain documents now held by the National Archives and proclaimed as fake are likely to be inauthentic. However, the situation of inauthentic documents is from a complex one

Id. at 291.

77. Holocaust Education & Archive Research Team, *Heinrich Himmler "Treue Heinrich"* (2007), <http://www.holocaustresearchproject.net/holoprelude/himmler.html>.

78. See ALLEN, *supra* note 33, at xvii. It must be remembered that with the end of World War I "many wartime politicians in Germany had continued their careers under the Weimar Republic." *Id.*

79. MASUR *supra*, note 33, para. 40. Himmler also promised that he would make an effort to stop the death marches of Jewish captives and attempt to have the camps remain intact for surrender to the Allies. *Id.* paras. 37-40.

80. *Id.* para. 40. True to his assurances and with the cooperation of Count Folke Bernadotte, the acting head of the Swedish Red Cross, between April 24 and 26 the women were released for transport by land to Denmark and eventually on to Sweden. See *id.* paras. 53, 55. Subsequent to Masur's departure, and as an apparent follow-up to the earlier agreement, Himmler also released all the women who were being held at Ravensbrück. *Id.* para. 55; BAUER, *supra* note 41, at 246.

One *thousand*? Perhaps as many as 12 *million* had been exterminated by the Nazis, of whom 6 *million* were Jewish.⁸¹ As Minister of the Interior⁸² and head of the SS, Himmler was in charge of Germany's concentration camps, the death camps of Eastern Europe, and the mobile mass-murder squads known as Einsatzgruppen.⁸³ Was the belated sparing of a thousand Jews going to placate his inevitable prosecutors? Yet, as we have seen, there is reason to conclude that Himmler could have believed that a series of such token acts of mercy might work to his benefit.⁸⁴ Perhaps the irrational belief that such a *gesture* could affect his post-war fate was as much a part of Himmler's pathological delusions as was the racist philosophy that had resolved itself into the "Final Solution."

So let us pose the question from a somewhat different perspective: After the slaughter of so many millions, is or was there anyone who really cared about the fate of another one thousand Polish Jewish women?

I care, and my mother certainly cared. She was one of those thousand women. Having survived, in the preceding year alone, (stays in the Łódź Ghetto, the camps at Auschwitz and Sachsenhausen, and slave labor at a Krupp munitions factory) she was now to be saved at the last moment from Ravensbrück.⁸⁵

81. DORIS L. BERGEN, *WAR & GENOCIDE: A CONCISE HISTORY OF THE HOLOCAUST* 232 (2d ed. 2009).

82. This was the same position held in Turkey by Mehmet Talaat, the architect of the Armenian massacres earlier in the century, and the man whose 1921 murder in Germany by a young Armenian had first interested law student Raphael Lemkin in the legal issues arising out of mass murder of Armenians. See EDWARD ALEXANDER, *A CRIME OF VENGEANCE* 40-64 (1991); ESHET, *supra* note 3, at 3-4.

83. See U.S. Holocaust Memorial Museum, *Einsatzgruppen (Mobile Killing Units)*, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005130> (last visited Nov. 19, 2009).

84. See *supra* notes 66-69 and accompanying text.

85. See JUDITH BUBER AGASSI, *THE JEWISH WOMEN PRISONERS OF RAVENSBRÜCK* 181 (2007). Though the exact identities of those transported on April 24 and 26 are not well documented, it is known that

On 25 April, in the afternoon, 20 buses or trucks supplied by the Danish Red Cross left the camp. In this group there were many Polish Jewish women, pregnant women, and 30 small children. Two groups of Jewish prisoners, the smaller one made up of women who had worked at Siemens, and the larger one, with 450-490 [of whom my mother was one] nearly all Polish Jewish women and girls from Łódź, Auschwitz, and Krupp-Neukölln, who had arrived in Ravensbrück about 8 or 12 days before, must have been among the evacuees of 25 and 26 April. Their transport was also strafed, and three of the Jewish women were killed and three wounded. *Id.* (footnotes omitted).

Had Himmler not given his self-serving order, my mother, and those saved with her, would likely have perished. If the fear of consequences could briefly stay the hand of even Heinrich Himmler, who might it also influence? What lives might it preserve?

Here then is the case for surrounding the crimes of genocide with the appearance of legal consequence. Determination to enforce such redress not only provides the potential for retribution and restitution, but also the prospect of some deterrence.

IV. "IF IT BE NOT NOW YET IT WILL COME. THE READINESS IS ALL."⁸⁶

In 1948, Raphael Lemkin took the word he had coined and, through force of personal will, criminalized it.⁸⁷ In that year, the UN General Assembly voted to add genocide to the list of international crimes,⁸⁸ obligating all signatories to intervene anywhere genocide is being committed,⁸⁹ and giving them the right of prosecution regardless of where the acts had occurred.⁹⁰ So complete was his authorship of this rule that to this day scholars,⁹¹ and commentators,⁹² both often refer to it simply as "Lemkin's Law."⁹³

86. WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 2.

87. Sonali B. Shah, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L L. REV. 351, 354 (2002).

88. *Id.*

89. Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, S. Treaty Doc No. 81-15, 78 U.N.T.S. 277 ("The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish.").

90. *Id.* art. VI ("Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

91. See, e.g. POWER, *supra* note 7, at 59.

92. See *Scream Bloody Murder* (CNN television broadcast Dec. 4, 2008).

93. *Id.* Lemkin then spent years lobbying country after country to sign the Convention. The law took effect in 1951 when the last of the twenty needed signatory nations signed on. The United States did not become a signatory until 1998. American passage may have finally been spurred on by the controversy created by then President Ronald Reagan having chosen to place flowers on the German graves of Nazi SS officers. These efforts may very well have taken a physical toll on Lemkin. He died before the end of the decade still in his 50s. Having spent so much of his life in the attempt to save the lives of others his funeral was attended by only 7 people. See Bernard Weinraub, *Reagan Joins Kohl in Brief Memorial at Bitburg Grave*, N.Y. TIMES, May 6, 1985, at A1, available at

Ironically, one of the last leading opponents of the UN's adoption of the rule was Britain's Nuremberg Trials prosecutor Hartley Shawcross.⁹⁴ Shawcross had reached the pessimistic conclusion that the Convention was a waste of time and that its passage would be the result of emotion and not global realism. Lemkin, however, was not a naïve idealist.⁹⁵ He did not expect that all genocidaires would lay down their arms and cease their crimes. "He simply believed that if the law was in place it would have [some] effect – sooner or later."⁹⁶

It cannot be denied that the Treaty's intervention provisions have been more honored in the breach than the observance. The political reality is that nations are rarely willing to risk their own troops or endanger alliances by intervention or acknowledgement of ongoing or even past genocides.⁹⁷ Yet, the pressure to act that signatories find themselves under may have already had some life-preserving effects. When Western Allied airpower belatedly entered the Balkans conflict at the end of the last millennium, tens of thousands of lives may have been saved from ethnic cleansing.⁹⁸

<http://www.nytimes.com/1985/05/06/international/europe/06REAG.html?&pagewanted=1>.

Much has been made in recent years of the refusal of American Presidents, as well as Congress, to support or pass resolutions recognizing that the massacre of the Armenians by the Turks between 1915 and 1923 to have constituted "genocide." In a sense, however, the United States recognized the "genocide" of the Armenians when it signed the Convention. With the ratification of any Convention should come an understanding of the legislative intent and history of the treaty. In this case, the legislative history is in large part the writings of Raphael Lemkin. In fact, today lawyers involved in prosecuting and defending crimes of genocide before international tribunals comb Lemkin's works in hope of finding legislative intent to support the particular position they, at that moment, may be espousing. Since Lemkin created the very term "genocide" to encompass the massacre of the Armenians, and since it was Lemkin who was most responsible for the creating of the Genocide Convention, (as to both authorship and passage) it would appear the United States should have understood that by signing on to this international treaty we were, to a large extent, accepting its definition of "genocide" to encompass those past Turkish acts against Armenia.

94. POWER, *supra* note 7, at 57; COOPER, *supra* note 3, at 95 ("Unfortunately Lemkin had completely misconstrued Shawcross's position on the genocide convention which was one of outright opposition.").

95. *See id.* at 479-80.

96. *See* A.M. Rosenthal, Op-Ed., *On My Mind; A Man Called Lemkin*, N.Y. TIMES, Oct. 18, 1988, at A31, available at <http://www.nytimes.com/1988/10/18/opinion/on-my-mind-a-man-called-lemkin.html?pagewanted=1>; POWER, *supra* note 7, at 479-80.

97. *See, e.g.* BASS, *supra* note 21, at 30 ("[C]ivilian leaders . . . shrink from casualties in the pursuit of international justice, as shown repeatedly in Bosnia.").

98. *See, e.g.* POWER, *supra* note 7, at 507 ("NATO bombing in Kosovo in 1999 liberated 1.7 million Albanians from tyrannical Serb rule.").

Similarly, thousands were likely spared⁹⁹ when non-military pressure from the West, with the crucial (if somewhat delinquent) assistance of China, led the Sudanese government into a respite in the slaughter of its African population.¹⁰⁰

Just as nations have more often than not shirked their moral and treaty-imposed responsibility to militarily intervene in ongoing genocides, for decades the power to criminally prosecute perpetrators was ignored.¹⁰¹ Countless genocidal acts have been carried out and gone unpunished since the Convention's criminalization of genocide.¹⁰² Deterrence cannot exist without consequences.

It must be remembered that the initial verdict of genocide under international law¹⁰³ was rendered by the United Nations Tribunal for Rwanda in 1998,¹⁰⁴ while the first such European conviction was handed down in 2001 at the UN Criminal Tribunal at The Hague.¹⁰⁵ In fact, it was not until the 2002 creation of the International Criminal Court (ICC)¹⁰⁶ that prospective perpetrators of genocide were finally put on notice that their

99. *Scream Bloody Murder*, *supra* note 92, at 120:17 minutes. Though the nightmare continued, Professor Eric Reeves of Smith College estimates that without outside intervention "hundreds of thousands of additional lives would have been lost." *Id.*

100. R. Scott Greathead, Op-Ed., *Moving China on Darfur*, WALL ST. J., Nov. 6, 2007, at A18, available at <http://online.wsj.com/article/SB119431785968383575.html>. On August 31, 2006, the UN Security Council (China having dropped its prior opposition) voted for a peacekeeping force for Sudan. China agreed, however, only if the Sudanese consented, which they did not. It was not until July 2007, after Western pressure on China persuaded them to, in turn, put pressure on Khartoum that Sudan agreed to a UN force. *See id.*, Sudanreeves.org, China and the 2008 Olympic Games, <http://www.sudanreeves.org/Page-10.html>.

101. *See, e.g.*, POWER, *supra* note 7, at 493 (noting that it was not until July 1997 that NATO made its first arrests of suspected Serbian war criminals in northern Bosnia).

102. *See, e.g., id.*

103. In 1948, the commandant of Auschwitz was convicted by a Polish National Tribunal of genocide prior to it having been made an international crime. Similarly, Adolph Eichmann was convicted in Israel in 1961 under a law dealing with Nazis and Nazi Collaborators which closely tracked the language of the Genocide Convention but was not specifically governed by it.

104. POWER, *supra* note 7, at 486 (discussing how Jean-Paul Akayesu, the Hutu mayor of Rwanda's Taba community, was found guilty of the systematic rape of Tutsi women).

105. *Id.* at 479. In his 1995 assault on Srebrenica, Bosnian General Radislav Krstić ordered the killing of all the men of fighting age in the city. In December 1998, he was detained by American troops and beginning on March 13, 2000, he was to find himself the defendant in a sixteen month long trial before the UN criminal tribunal at The Hague. At trial's end, General Krstić became the first person convicted of genocide in Europe. *Id.*

106. To read more about the Court, see Coalition for the International Criminal Court, About the Court, <http://www.iccnw.org/?mod=court> (last visited Nov. 19, 2009).

crimes might also torment their own futures. Yet, after decades during which Convention signatories allowed tyrants to act with impunity, the reality of consequences requires a period of adjustment.

To many accused, governance by international justice remained not merely a novel concept but an illegitimate one. When brought before the international tribunal in 2000 to stand trial for genocidal crimes, the former President of Serbia and of Yugoslavia, Slobodan Milošević, denied not only the Court's jurisdiction, but even refused counsel.¹⁰⁷ The judges may have gone home some evenings frustrated with the defendant, but Milošević was not going anywhere. He died of a heart attack in his cell on March 11, 2006 before his lengthy trial could be completed.¹⁰⁸

Once actual arrests and prosecutions of Serbians were initiated, not only did local Bosnian officials start detaining accused war criminals, but some frightened suspects began turning themselves in to authorities. It has been speculated that perhaps these hunted men may have preferred the prospect of "life in a European prison to life on the run."¹⁰⁹

Whether the specter of prosecution (or even the possibility of civil liability) has or will act to deter may never be proven or disproven with certainty. There is, however, a consistency to human nature that makes the desire for self-preservation stronger than indifference to one's own fate, even for the likes of Heinrich Himmler.

It is for the twenty-first century to determine whether the *in terrorem* of possible consequences will finally give the world the true benefit of Lemkin's legacy; but if the deaths of one thousand, one million or one can be averted, what excuse have we for failing to enforce Lemkin's rule of law? Why litigate genocide? The answer can be found in the value of a single human life.

107. Slobodan Milosevic had been President of the Socialist Republic of Serbia and Federal Serbia from 1989 to 1997 and President of the Federal Republic of Yugoslavia from 1997 to 2000. Marlise Simons & Alison Smale, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes, Dies*, N.Y. TIMES, Mar. 12, 2006, at N34, http://www.nytimes.com/2006/03/12/international/europe/12milosevic.html?pagewanted=1&_r=1.

108. Marlise Simons, *Milosevic Died of Heart Attack, Autopsy Shows*, N.Y. TIMES, Mar. 13, 2006, at A1, available at <http://topics.nytimes.com/2006/03/13/international/europe/13milosevic.html>.

109. POWER, *supra* note 7, at 494.